87-846

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In re KENDAVIS HOLDING COMPANY AND KENDAVIS INDUSTRIES INTERNATIONAL, INC.,

Debtors

K.W. DAVIS, JR., ALANA LAWLER, ALANA LAWLER TRUST "A", A.T. DAVIS, A.T. DAVIS TRUST "A", KAY DAVIS, KAY DAVIS TRUST "A", TRICIA KAE LAWLER, ALANA LAWLER CHILDREN'S TRUST, ALLEN KENNETH DAVIS, JANIECE BREANNE DAVIS, A.T. DAVIS CHILDREN'S TRUST, KAY DAVIS CHILDREN'S TRUST, T.C. DAVIS, II, T. C. DAVIS, II TRUST, T.C. DAVIS, II TRUST "A", T.C. DAVIS, II TRUST "A" DATED JANUARY 15, 1982, BRIAN KEITH DAVIS, BRIAN KEITH DAVIS TRUST, BRIAN KEITH DAVIS TRUST "A", BRIAN KEITH DAVIS TRUST DATED JANUARY 15, 1982, CHESLEY DAVIS, CHESLEY DAVIS TRUST, TREY DAVIS, TREY DAVIS TRUST, KEN W. DAVIS FOUNDATION, AND TWALLA DUPRIEST, TRUSTEE FOR ESTATE OF T.C. DAVIS,

Petitioners

v.

THE OFFICIAL UNSECURED CREDITORS' COMMITTEES FOR KENDAVIS HOLDING COMPANY AND KENDAVIS INDUSTRIES INTERNATIONAL, INC., KENDAVIS HOLDING COMPANY, FEDERAL DEPOSIT INSURANCE CORPORATION, BANK OF NOVA SCOTIA, AND MBANK HOUSTON, N.A.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

On November 24, 1986, a United States bankruptcy judge entered an order confirming a plan of reorganization under chapter 11 of title 11 of the United States Code for two corporate debtors. While appeals were pending in the United States District Court, the bankruptcy judge revealed that throughout the bankruptcy proceedings he owned stock in J.P. Morgan Co., Inc., holding company of Morgan Guaranty Trust Co. Morgan Guaranty was a major creditor, a signatory to the involuntary bankruptcy petition, a member of the creditors' committees of both debtors, and a proponent of the confirmed plan. Petitioners' motion to vacate the order confirming the plan of reorganization and related orders was denied by the District Court and this decision was affirmed by the United States Court of Appeals for the Fifth Circuit.

The questions presented are:

1. Is a bankruptcy judge disqualified under 28 U.S.C. § 455(b) if, based on the objective facts, he should have known that he owned stock in a corporate party? Is ownership of stock in the holding company-parent the ownership of stock in a bank-subsidiary for purposes of 28 U.S.C. § 455(b)(4)?

2. Where a bankruptcy judge has forgotten, neglected or overlooked that he owns stock in a party, are orders entered by said judge invalid if the issue is timely raised? If so, is the issue timely raised if it is raised during the appeal process?

3. When it is revealed post-judgment that a bankruptcy judge held stock in a corporate party to the proceedings before him, should a hearing be held to determine whether the judge knew or should have known that he held such stock at the time of the entry of the orders in question?

PARTIES TO PROCEEDING BELOW

In addition to the parties named in the caption of this case, the following were made parties to the proceeding in the Fifth Circuit:

The Bank of New York
The Chase Manhattan Bank, N.A.
Credit Commercial De France, New York Branch
Cummins Sales & Service, Inc.
Den Norske Creditbank
Development Bank of Singapore Limited
First City National Bank of Fort Worth
First City National Bank of Houston
First Interstate Bank of California
First National Bank & Trust Company of Oklahoma City
First National Bank of Fort Worth
First RepublicBank Dallas, N.A.
First RepublicBank Fort Worth, N.A.
Frigette Corporation
Geodril, Inc.
Globe Machinery and Supply Company
Harrisburg, Inc.
Interfirst Bank Fort Worth, N.A.
Irving Trust Company
Kendavis Industrial Supply Co.
Loffland Brothers Company
Loffland Brothers Eastern Hemisphere, Inc.
Loffland Brothers (Singapore) Pte., Ltd.
Mechanical Rubber Products Corporation
Miami-Dickerson Steel Company
Midco Equipment Co.
Mid-Continent Supply Co.
Moore & Sons, Inc.
Morgan Guaranty Trust Company of New York

The National Commercial Bank of Saudi Arabia
Nippon Kokan Kabushiki Kaisha
Rig-A-Lite Company, Inc.
Security Pacific National Bank
Sligo, Inc.
State Pipe & Supply Co.
Texas American Bank (Fort Worth), N.A.
Unit Rig & Equipment Co.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING BELOW	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
1. The Bankruptcy Judge Was Disqualified at the Time the Bankruptcy Court Orders Were Entered Because He Owned Common Stock in the Bank Holding Company of a Major Bank Creditor	7
(a) The Bankruptcy Judge Knew He had a Financial Interest Pursuant to 28 U.S.C. § 455(b)(4)	8
(1) Historical Background	8
(2) Section 455(b)(4) Focuses on the Appearance of Impropriety	8
(3) Knowledge of Financial Interest	12
(b) The Bankruptcy Judge's Interest In the Holding Company-Parent of a Party is the Ownership of a Financial Interest In A Party Under 28 U.S.C. § 455(b)(4)	18
(c) The Ownership of Stock in the Bank Holding Company of a Major Creditor Establishes a Reasonable Basis for Questioning the Judge's Impartiality	19

TABLE OF CONTENTS — (Continued)

	Page
2. The Challenged Orders Are Invalid	20
(a) Only Vacation of The Judgment and a New Trial Adequately Protect the Public's Expectation of Impartiality	20
(b) Entry of Orders by a Judge Holding a Financial Interest in a Party Deprives the Other Parties of Due Process of Law	23
(c) Disqualification is Jurisdictional	26
(d) The Petitioners Were Not Given a Full Opportunity to Develop Information Relating to the Scope of the Knowledge of the Bankruptcy Judge	27
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580 (1986)	25
Baker v. Carr, 369 U.S. 186 (1962)	11
Buckholts Indep. School Dist. v. Glaser, 632 S.W.2d 146 (Tex. 1982)	26
Casterella v. Casterella, 409 N.Y.S.2d 548 (N.Y. App. Div. 1978)	26
Catherines v. Copytele, Inc., 608 F. Supp. 1031 (E.D.N.Y. 1985)	18
Cary v. Curtis, 3 How. (44 U.S.) 236 (1845)	26
Commodity Futures Credit Comm'n v. Schor, ___ U.S. ___, 106 S.Ct. 3245 (1986)	27
Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) *reh'g denied*, 393 U.S. 1112 (1969)	23, 24
Cordova v. Hood, 17 Wall. (84 U.S.) 1 (1873)	16
Davis v. Xerox, 811 F.2d 1293 (9th Cir. 1987), *petition for cert. filed* (July 6, 1987)	20
Gaer v. Bank of Baker, 107 P.2d 877 (Mont. 1940)	26
Health Services Acquisition Corporation v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), *cert. granted*, 107 S.Ct. 1368 (1987)	passim
King v. United States, 379 U.S. 329 (1964)	16
Kinnear-Weed Corp. v. Humble Oil & Refining Co., 403 F.2d 437 (5th Cir. 1968), *cert. denied*, 404 U.S. 941 (1971)	6, 27
Liljeberg v. Health Services Acquisition Corp., No. 86-957	7
In re Murchison, 349 U.S. 133 (1955)	24, 25

TABLE OF AUTHORITIES — (Continued)

	Page
NEC Corp. v. Intel Corp., 654 F. Supp. 1256 (N.D. Cal. 1987)	17
Palmore v. United States, 411 U.S. 389 (1973)	26
Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980), *cert. denied*, 449 U.S. 820	6
Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952)	15, 23
Stoll v. Gottlieb, 305 U.S. 165 (1938)	27
Tumey v. Ohio, 273 U.S. 510 (1927)	23, 24, 25
United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986)	20, 21
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	24
Weingart v. Allen and O'Hara, Inc., 654 F.2d 1096 (5th Cir. 1981)	18
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	26
Rules:	
Bankruptcy Rule 5004(a)	4
Constitutions and Statutes:	
U.S. Const., Amend. V	23
U.S. Const., Article III, Sections 1 and 2	26
11 U.S.C. § 1129(b)(1)	3
11 U.S.C. § 1141	3
28 U.S.C. § 157	27
28 U.S.C. § 158 (1982 & Supp. II 1984)	4
28 U.S.C. § 455 (1982)	passim
28 U.S.C. § 455(a)	passim
28 U.S.C. § 455(b)	passim
28 U.S.C. § 455(b)(4)	passim

TABLE OF AUTHORITIES — (Continued)

	Page
28 U.S.C. § 455(c)	5, 12, 13, 14, 15, 18
28 U.S.C. § 455(d)(4)	7
28 U.S.C. § 1254(1) (1982)	2
28 U.S.C. § 1334 (1982 & Supp. II 1984)	4, 27
Legislative History:	
Judicial Disqualification: Hearing on S.1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93d Cong. 1st Sess. 1 (1973)	passim
Judicial Disqualification: Hearing on S.1064 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, 93d Cong. 2d Sess.	passim
S. Rep. No. 93-419, 93d Cong. 1st Sess. (1973)	passim
Sen. Exec. Rep. No. 91-12, 91st Cong. 1st Sess. (1969)	9, 23
1974 U.S. Code Cong. & Admin. News 6,351	passim
120 Cong. Rec. 36,269 (1974)	22
Other Authorities:	
Annotation, *Disqualification Of Judge Because Of His Or Another's Holding Or Owning Stock In Corporation Involved In Litigation*, 25 A.L.R.3d 1331 (1969)	26
Code of Judicial Conduct	passim
Canon 3C	9
Canon 3C(1)	9, 10
Canon 3C(2)	13
Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947)	12, 24
Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736 (1973)	8, 11, 13, 18
E. Thode, *Reporters Notes to Code of Judicial Conduct* (1973)	10
13A Wright, Miller and Cooper, *Federal Practice and Procedure* § 3546 (1984)	13

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No. _____

K.W. DAVIS, JR., et al.,

Petitioners

v.

OFFICIAL UNSECURED CREDITORS' COMMITTEES et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] ("Petitioners") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is reprinted in the appendix to this petition at Appendix p. 6 ("App.-6" hereafter). The Memorandum Order of the United States District Court for the Northern District of Texas, Dallas Division, is unpublished and is reprinted at App.-11.

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[1] The notices of appeal were filed by all Petitioners plus T.C. Davis. T.C. Davis was replaced as an appellant by his bankruptcy trustee, Twalla Dupriest, by order of the Fifth Circuit entered September 16, 1987.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1987. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

The statutory provision involved in this case, 28 U.S.C. § 455 (1982), is set forth at App.-3.

STATEMENT

On February 21, 1985, certain bank creditors filed involuntary petitions for relief under chapter 11 of title 11, United States Code ("Code" or "Bankruptcy Code" hereafter) against Kendavis Holding Company ("KHC") and Kendavis Industries International, Inc. ("KIII")[2] (collectively "Debtors"). On March 11 and 13, 1985, respectively, orders for relief were entered as to KHC and KIII. On November 24, 1986, certain orders and findings were entered by United States Bankruptcy Judge Robert C. McGuire (the "Bankruptcy Court Orders") that confirmed a plan of reorganization for KHC and KIII (the "Plan") which was proposed by the Official Unsecured Creditors' Committees for each Debtor (the "Creditors' Committees").[3] The Committees'

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[2] KIII is a wholly-owned subsidiary of KHC. Petitioners are all the former equity owners of KHC. Additionally, K.W. Davis, Jr., Kay Davis and T.C. Davis were each holders of Class 6 claims under the plan of reorganization.

[3] The members of the KHC Creditors' Committee are Security Pacific National Bank, The Bank of Nova Scotia, Morgan Guaranty Trust Company of New York, Continental Illinois National Bank and Trust Company of Chicago, The Bank of New York,

Plan was confirmed by "cram down" pursuant to Bankruptcy Code § 1129(b)(1). Petitioners are bound by the provisions of the Plan under Bankruptcy Code § 1141. Under the Plan, Petitioners' equity securities are cancelled. Notices of appeal of the Bankruptcy Court Orders were timely filed by Petitioners on December 4, 1986.

By telephone conference hearing on March 23, 1987, Judge McGuire informed counsel for the Debtors and the Creditors' Committees that, individually and as a trustee of two trusts, he owned stock in J.P. Morgan Company, Inc. ("J.P. Morgan") and had done so throughout the period of these bankruptcy cases.[4] See App.-18 for transcript of telephone conference and App.-22 for March 20, 1987 issue of *The Value Line Investment Survey ("Value Line")* (an investment report regularly received by the judge).[5] Morgan Guaranty Trust Company of New York ("Morgan Guaranty") is a major creditor, a signatory to the involuntary petitions against the Debtors, and a member of the Committees. The holding company for Morgan Guaranty is J.P. Morgan. App.-25. Substantially all of the assets and business of J.P. Morgan are

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MBank Houston, N.A., First Interstate Bank of California, Irving Trust Company, Chase Manhattan Bank, N.A., Interfirst Bank Dallas, N.A., First City National Bank of Houston, and Credit Commercial de France, New York Branch. Membership of the KIII Creditors' Committee is identical with the membership of the KHC Creditors' Committee, except that the First National Bank & Trust Company of Oklahoma City is a member of the KIII Committee only. They will be referred to herein collectively as "Creditors' Committees".

[4] On Mar. 26, 1987, this stock had a market value of $36,057. Wall St. J., Mar. 27, 1987.

[5] Each of these documents was attached to Petitioners' Motion to Vacate filed in the district court and are part of the appellate record.

derived from Morgan Guaranty. *Id.* Judge McGuire recused himself on March 26, 1987.

On March 26, 1987, United States District Judge A. Joe Fish entered various orders and judgments (the "March 26 Orders") affirming the Bankruptcy Court Orders.

On March 31, 1987, the Petitioners filed in the district court a motion to vacate the Bankruptcy Court Orders based on the bankruptcy judge's disqualification pursuant to 28 U.S.C. § 455.[6] The district court's jurisdiction was based on 28 U.S.C. § 1334 and § 158 (1982 & Supp. II 1984). This motion was denied on April 10, 1987, by the district court's Memorandum Order. App.-11.

On April 13, 1987, the Petitioners filed a notice of appeal and a motion for an expedited appeal.[7] The expedited appeal was granted by the Fifth Circuit by order of April 15, 1987.[8]

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[6] This section is expressly applicable to bankruptcy judges pursuant to Bankruptcy Rule 5004(a).

[7] Prior to the entry of the Memorandum Order denying the motion to vacate, a notice of appeal of the March 26 Orders and motion for an expedited appeal had been filed. The second notice of appeal and motion for expedited appeal included all issues previously raised and added the Memorandum Order and the district court's Order Granting Committees' Motion to Quash Notice of the Davises to Take Deposition of the Honorable Robert C. McGuire, United States Bankruptcy Judge ("Order Quashing Deposition"). App.-31

[8] The appeal was originally orally argued before the Fifth Circuit on June 3, 1987. Subsequently, parties were informed that all three circuit judges hearing oral argument had disqualified and the case was to be reargued September 16, 1987. The second panel was composed of two senior circuit judges because of the disqualification or unavailability of other active circuit judges. App.-9 and 8.

REASONS FOR GRANTING THE WRIT

At the time he entered orders which, among other things, cancelled the equity securities owned by Petitioners, the bankruptcy judge owned $36,000 worth of publicly traded stock in J.P. Morgan. The plan confirmed was supported and proposed by Morgan Guaranty — wholly-owned subsidiary of J.P. Morgan. The bankruptcy judge did not disqualify as required by 28 U.S.C. § 455(b)(4) because he failed to recognize that substantially the entire business of J.P. Morgan was the ownership of Morgan Guaranty. He did not realize this, in spite of the fact that he recognized the similarity of names early in the proceedings and that he regularly received *Value Line* which clearly revealed the J.P. Morgan/Morgan Guaranty relationship. The public's perception of the impartiality of the bankruptcy judge can, by its very nature, only focus on the fact of ownership and the judge's possession of information revealing the relationship. From this information it can reasonably be concluded that the judge should have known that he owned a financial interest in Morgan Guaranty. Since he objectively should have known, he must be concluded to have known in light of his statutory duty to inform himself of his own financial interest under § 455(c). A party cannot escape the consequences of a statutory duty to be informed by the *ipse dixit* that he failed to notice. If true of the public at large, it must certainly be true of the federal judiciary which holds the public to such standards. It simply will not do for the judiciary to be perceived as applying one standard to itself and the brethren of the bench and another standard to litigants that come before that bench. Tolerance of judicial decisions rendered by judges owning financial interests in a party, however small, are not dangerous merely or principally because they are likely to in fact subjectively bias the decision. The greater danger is that, being perceived by the public as questionable practices, they will undermine the

public's confidence in the impartiality of that judiciary — an impartiality without which the judiciary will fail of its essential function.

Nevertheless, the district court accepted Judge McGuire's unsworn *ipse dixit* as to the facts concerning his knowledge of his financial interest, denied Petitioners their request to depose Judge McGuire (relief opposed by Respondent Committees and not by Judge McGuire), and held that § 455(b)(4) requires "actual prior knowledge" (App.-14) and that "a reasonable person, knowing all the surrounding circumstances, would not expect that Judge McGuire had actual or constructive knowledge of any conflict." App.-15-16. The Fifth Circuit affirmed stating "the district judge was entitled to accept the bankruptcy judge's statement of his lack of knowledge that the corporation in which he held stock was the corporate parent of a creditor of the bankrupt debtor and might be affected by the outcome of the proceeding." App.-7.

Review of this decision is merited, therefore, because it presents important questions never heretofore treated by this Court concerning the duties of a judge to be informed about his own financial interests in a corporate party and the effect of those interests on his duty to disqualify under 28 U.S.C. § 455 (1982). These issues vitally affect the federal judiciary and especially affect the bankruptcy courts and their administration of complex reorganization cases. The Fifth Circuit decision seriously departs from established law mandating a due process hearing of factual issues related to judicial disqualification.[9] The instant decision also departs from the

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[9] *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796 (5th Cir. 1986) *cert. granted*, 107 S.Ct. 1368 (1987) (scheduled to be orally argued December 9, 1987); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980), *cert. denied*, 449 U.S. 820; and *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437

Fifth Circuit decision in *Health Services Acquisition Corp.*, 796 F.2d 796 (5th Cir. 1986) *cert. granted*, 107 S.Ct. 1368 (1987)[10] on the applicability of a constructive knowledge test to 28 U.S.C. § 455(a).[11] Conflict exists among the circuits on the effect of rulings rendered by a judge who failed to disqualify as required by 28 U.S.C. § 455 and the requisite timing for raising disqualification issues which have been overlooked by the judge. Finally, this Court has never addressed the question of the purpose and effect of 28 U.S.C. § 455(b) as it relates to financial interests of a judge in a party or the corporate subsidiary of a party. All of these issues raise serious questions about the appearance of impartiality of the federal judiciary and thus impact the administration of justice in these courts.

1. The Bankruptcy Judge Was Disqualified at the Time the Bankruptcy Court Orders Were Entered Because He Owned Common Stock in the Bank Holding Company of a Major Bank Creditor.

The bankruptcy judge at all pertinent times had a "financial interest" in the corporate parent of a party to a proceeding before him. 28 U.S.C. § 455(b)(4) and § 455(d)(4). The pertinent issue under 28 U.S.C. § 455(b)(4) is whether the bankruptcy judge "knew" his interest in the holding company was an interest in the bank subsidiary. In any event, the

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(5th Cir. 1968), *cert. denied*, 404 U.S. 941 (1971). The decision below was participated in by two senior circuit judges because of the disqualification or unavailability of active circuit judges. See Certificate of Need filed by Chief Judge Clark on September 30, 1987. App.-8.

[10] Petitioners herein have filed an *amicus* brief in this Court in *Liljeberg v. Health Services Acquisition Corp.* (No. 86-957).

[11] This particular departure is not correctable by a rehearing *en banc* in light of the unavailability of Fifth Circuit judges. App.-8.

ownership of stock in a bank holding company of a major bank creditor creates a basis for reasonably questioning the judge's impartiality under 28 U.S.C. § 455(a).

(a) The Bankruptcy Judge Knew He had a Financial Interest Pursuant to 28 U.S.C. § 455(b)(4).

(1) *Historical Background.* In 1969 the U.S. Senate refused to confirm the nomination of circuit judge Clement Haynsworth to be an associate justice, in part, because of disclosures that on several occasions he had participated in decisions in which he held stock in a party, including three instances where he held stock in a corporate parent of a party, or in a corporation which was a substantial creditor of a party.[12] From the Senate debate came an agreement between Senator Birch Bayh and Senator Ernest Hollings to clarify then-existing legislation concerning judicial disqualification. *Senate Hearings*, p. 25 (testimony of Senator Hollings).

(2) *Section 455(b)(4) Focuses on the Appearance of Impropriety.* Senate Bill 1064[13] was partly the result of the Bayh-Hollings agreement and was enacted to bring the federal statutory requirements closer to the new ethical rules of the Code of Judicial Conduct of the American Bar Association

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[12] See *Note, Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736 (1973) ("*Harvard Note*" hereafter) and *Judicial Disqualification: Hearing on S.1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 93d Cong. 1st Sess. 1 (1973) ("*Senate Hearings*" hereafter) (opening statement of subcommittee chairman Quentin N. Burdick). (Hearings held on July 14, 1971, and May 17, 1973, were reported in a single document with consecutive pagination. The hearings of May 17, 1973, begin on page 73.)

[13] The Senate Bill 1064 amended 28 U.S.C. § 455 in 1974.

("A.B.A. Code"). It is based upon Canon 3C.[14] In amending 28 U.S.C. § 455 Congress was, of course, concerned with influences that actually and improperly affect the impartial administration of justice. But the ethical concerns noted in connection with the Haynsworth confirmation did not involve *any* evidence or accusation of actual bias by the judge because of his financial interests.[15] The *appearance* to others of possible partiality was the focus of these criticisms. Throughout the legislative history, the theme is the promotion and protection of public and litigant confidence in the impartiality of judicial decisions. Thus, while the appearance of impartiality is the general theme of § 455(a), it is also the pointed theme of § 455(b)(4).

Canon 3C(1) of the A.B.A. Code provides that "a judge should disqualify himself" where "his impartiality might reasonably be questioned. *including* but not limited to instances

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[14] *Senate Hearings*, p. 2; *S. Rep.* No. 93-419, 93d Cong. 1st Sess. 1 (1973) ("*Senate Report*" hereafter); H.R. No. 93-1453, 93d Cong. 2d Sess. 1 (1974) reprinted in 1974 *U.S. Code Cong. & Admin. News* 6,351 ("*House Report*" hereafter); and *Senate Hearings*, p. 113-14 (statement of John P. Frank). John P. Frank is perhaps the most prolific expert on judicial disqualification in the United States. Because of his landmark article on judicial disqualification cited below, he testified as an expert witness at the request of Senator James Eastland in connection with the Haynsworth confirmation hearings. Additionally, he testified twice before the Senate subcommittee and once before the House subcommittee on amending 28 U.S.C. § 455. He also worked with Senator Bayh on his initial bill. See *Senate Hearings*, p. 32, 13 and *Judicial Disqualification: Hearings on S.1064 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary*, 93d Cong., 2d Sess. p. 8 (1974) ("*House Hearings*" hereafter) (testimony of John P. Frank).

[15] See *Sen. Exec. Rep.* No. 91-12, 91st Cong. 1st Sess. (1969) (individual views beginning at p. 40).

where: . . . (c) he knows that he . . . has a financial interest . . . in a party to the proceeding . . . ." (emphasis added). Thus, under the A.B.A. Code, having a financial interest was merely a specific instance where a judge's impartiality might be questioned.[16]

While the language in § 455 does not include the connecting phrase "including but not limited to" between subparagraph (a) and (b) as is found in Canon 3C(1), there is no reason to think that this difference is meaningful. Congress intended in § 455(a) to set up an objective and general standard to govern judicial disqualifications.[17] Thus lack of impartiality was not to be judged subjectively but where "there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify. . . ." Section 455(b) listed specific situations in which a judge was disqualified to aid the judge "in avoiding possible criticism for failure to disqualify. . . ." [18]

The congressional theme reflects historical concerns that judicial decisions in a democracy derive their principal sanc-

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[16] See E. Thode, *Reporters Notes To Code of Judicial Conduct* p. 60 (1973) ("A.B.A. Reporter's Notes").

[17] *House Report* p. 5-6, see identical language in *Senate Report* p. 5. Similarly, see *Senate Hearings*, p. 80 (testimony of Judge Roger Traynor, Chairman of the A.B.A. Special Committee on Standards of Judicial Conduct and former Chief Justice of the California Supreme Court); p. 93 and 99 (testimony of Professor E. Wayne Thode, Reporter for the A.B.A. Special Committee on Standards of Judicial Conduct); and *Senate Hearings*, p. 30 (testimony of Senator Hollings).

[18] *House Report, id.*

tion from public confidence in their impartiality. Possessing "neither the purse nor the sword"[19] authority of courts

> rest[s] ultimately on public acceptability of judicial decision making. That acceptability depends in turn on a belief in the impersonality and reasoned foundation of judicial decisions. Such a belief is, of course, undermined when judicial decisions may be closely identified with the interests or prejudices of the decision makers themselves. (footnotes omitted)

Harvard Note p. 746-47.

The relation of a judge's ownership of a financial interest in a party, and the "appearance of impropriety," is evident from the congressional decision to make the size of the financial interest irrelevant. Congress was dissatisfied with the substantial interest standard of § 455 as it stood. Disqualification for holding a substantial interest addresses, albeit imprecisely, actual partiality in a judge. Disqualification for holding a small interest can only address appearances. Admittedly, judicial ownership of a financial interest in a party would not necessarily *in fact* influence a judge to an improper decision. However, to a fair, impartial observer, such ownership doubtless appears questionable.

Concerns also existed that the constitutional guarantee of due process of law was impugned where a judge had any interest.[20] (See pgs. 27-30, *infra*). Congress' solution was to require disqualification for any financial interest,[21] as had

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[19] *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

[20] *Senate Hearings, p. 102* (testimony of Professor E. Wayne Thode).

[21] *House Report*, p. 2 and *Senate Report*, p. 2.

been the almost universal rule prior to 1948.[22] Disqualification for a small interest was seen as justified because it was impossible to know objectively the threshold of actual influence for all judges and no threshold avoids the appearance of impartiality absolutely.[23] As Judge Traynor said:

> An independent and honorable judiciary is an indispensable condition of justice in our society. It is not enough that people have confidence in the sturdiness of judicial procedure. They must have utmost confidence in the integrity of their judges. The basic purpose of the Code of Judicial Conduct is to assure that judges will be worthy of that independence and deserving of that confidence.

Senate Hearings, p. 80.

(3) *Knowledge of Financial Interest.* Under 28 U.S.C. § 455(b)(4), a judge is disqualified if he "*knows* that he . . . has a financial interest in . . . a party . . . " (emphasis added). Significantly, under § 455(c), a judge is required to "*inform himself* about his personal and fiduciary financial interest . . . " (emphasis added). Here, Judge McGuire admits that he possessed all of the objective facts showing that J.P. Morgan is the parent of Morgan Guaranty and that he regularly received the *Value Line* from which he actually, eventually discovered the relationship. App.-22.

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[22] *Senate Hearings*, p. 34 (testimony of John P. Frank) and Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 627 (1947) ("*Frank Disqualification*" hereafter).

[23] See *Senate Hearings*, p. 15 and 16 (testimony of Senator Bayh); p. 26 (testimony of Senator Hollings); p. 46 (testimony of John P. Frank); and *House Hearings*, p. 9 (testimony of John P. Frank).

Congress deliberately distinguished between the judge's duty as to his own financial interests (for which he "has a duty to inform himself") and those of his spouse or minor children (for which he "must merely make a reasonable effort to inform himself").[24]

Wright, Miller and Cooper have noted that:

> The judge . . . is disqualified only if "he knows" of the financial interest. *Meaning is put into this*, however, by another provision of the amended statute that provides that a judge should inform himself about his personal and fiduciary financial interest, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household. (emphasis added)

13A Wright, Miller and Cooper, *Federal Practice and Procedure* § 3546, p. 600 (1984). The *Harvard Note*, footnote 66 p. 752, states that "as a corollary to the [A.B.A.] *Code's* provisions requiring disqualification on account of financial interests, Canon 3C(2) requires a judge to 'inform himself about his personal and fiduciary financial interests.' "

Congress did not intend to permit a judge to escape the provisions of § 455(b)(4) by oversight. The district court and the Fifth Circuit in the instant case mistakenly turn § 455(c) into a requirement that in all cases the judge need only make reasonable inquiry for the judge's statement alone negates any responsibility for his failure to adhere to § 455(c). This interpretation negates the distinctions clearly set out in § 455(c).

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[24] *House Report*, p. 6-7, and *Senate Report* p. 6.

Congress was clearly aware of the significance of this obligation. In the House Hearings the following exchange took place between Congressman Cohen and Judge Traynor:

> "Mr. Cohen. . . . as I understand it, this would prohibit any kind of financial interest of a judge sitting on a case in which he might have any kind of an interest, is that correct?
>
> Judge Traynor. That is right.
>
> Mr. Cohen. That would take in a situation I assume that if a fairly wealthy judge has several million dollars in assets, let's say tied up in perhaps a blind trust or some sort of a portfolio, would he be required, under this legislation, to review each and every stock that he had?
>
> Judge Traynor. Yes, he is obliged to, and in a way repudiate the blind trust device.
>
> Mr. Cohen. So he has a continuing obligation constantly to review whatever assets he might have in the form of stocks?
>
> Judge Traynor. That is right, and there is an exception here for mutual funds, because of the impossibility of keeping track of a portfolio of a mutual fund.

House Hearings, p. 15-16.

John P. Frank informed Congress as regards § 455(c):

> This provision requires the judge to be informed about his own personal financial interests and calls upon him to make a reasonable effort to know about those of the relations who might, by virtue of their holdings, cause him to be disqualified. There are highly practical problems here. Some people hold a wide number of stocks, or maintain portfolios in which there may be

> considerable turnover. There exists the possibility of disqualification in fact where the judge does not know that he has a particular investment. I read this provision to be virtually a requirement that those judges who have extremely disbursed holdings must make an effort to consolidate them; *they will not be excused for failing to know what they have*. On the other hand, they clearly cannot as well know of varying investments of relatives, and here all that is required is "a reasonable effort." (emphasis added)

Senate Hearings, p. 115 (statement of John P. Frank).

Thus, the combination of § 455(b)(4) and the duty to be informed as to personal and fiduciary investments under § 455(c) establish a standard by which a judge is charged, conclusively, with knowledge of that which information in his possession reveals about his financial interest or which reasonable inquiry would reveal.

Any other position vitiates § 455(b)(4). Not only do such judicial interests create public and litigant doubt about the fairness of decisions, but such interests themselves undermine the fairness of the process whether or not they consciously affect the judge's decision. As Justice Frankfurter said in recusing himself on the ground of personal bias in *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 466 (1952):

> The fact is that, on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings

> may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

No reason appears in the text, history, or policy of § 455 for distinguishing between (1) the constructive knowledge derived from the possession of revealing information and the duty to be informed, and (2) knowledge of a financial interest under § 455(b)(4). Neither forgetfulness, oversight, nor neglect are "the sort of objectively ascertainable fact[s] that can avoid the appearance of partiality." *Health Services Acquisition Corporation v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986) *cert. granted*, 107 S.Ct. 1368 (1987).[25]

"Whenever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself." *Cordova v. Hood*, 17 Wall. (84 U.S.) 1, 8 (1873). In *King v. United States*, 379 U.S. 329 (1964), a corporate officer was held liable as distributing agent to the government on a priority claim in bankruptcy for having paid non-priority creditors. He was bound by his duty to know the status of assets and claims and his subjective, conscious awareness was

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[25] The court in *Health Services* distinguished § 455(a) and § 455(b)(4) based upon the statutory use of the word "know" in § 455(b)(4) which was absent in § 455(a). The court did not discuss whether this distinction was of significance and the reasoning of the court as to the § 455(a) problem is directly applicable to the § 455(b)(4) problem — at least in the context where the information is unambiguously available in the judge's own records. See *infra*.

irrelevant. See 379 U.S. at 339-40. In the instant case the judge had an explicit duty to stay informed. This duty corresponded fully with the congressional expectations. How can the public and losing litigants be satisfied by being told the judge failed to know what he owned?

Public perceptions will, and must, focus on the objective facts. The subjective "conscious awareness" relied on below[26] is ever shielded from public view. An assessment of a judge's knowledge of his own financial interests by an objective appraisal of the facts is the only means of supporting the congressional purpose in 28 U.S.C. § 455. The public's confidence of neccesity will be measured by the public's perception of events. This must be measured, not by rumor and innuendo, but by an appraisal of the objective facts. Thus, whether a judge knew of a financial interest for purposes of § 455(b)(4) must be determined from the information available to the judge, in light of the judge's duty to be informed about that financial interest and consequent duty to disqualify. Under the facts in this case on the limited record,[27] Petitioners believe that the judge was disqualified at the time of the entry of the challenged orders.

In this case, on an objective basis, Judge McGuire must be said to have known that he owned stock in J.P. Morgan and that it was significantly related to Morgan Guaranty. He held this stock personally and as a fiduciary. Virtually the sole business activity of J.P. Morgan is the ownership of Morgan Guaranty. Ownership of Morgan Guaranty is the only possible reason one would own stock in J.P. Morgan. He was regularly furnished the *Value Line* which on its face and

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[26] And followed by the court in *NEC Corp. v. Intel Corp.*, 654 F. Supp. 1256 (N.D. Cal. 1987).

[27] See *infra pgs.* 27-29.

unambiguously revealed the ownership of Morgan Guaranty by J.P. Morgan. Moreover, he had a duty under § 455(c) to inform himself as to his personal and fiduciary financial interests as well as a state law based duty as a fiduciary to be aware of said holdings. The judge's actual, subjective integrity is not called into question. But an objective test is essential to protect the public and litigant confidence in the judge's impartiality.

(b) The Bankruptcy Judge's Interest In the Holding Company-Parent of a Party is the Ownership of a Financial Interest In a Party Under 28 U.S.C. § 455(b)(4).

The Fifth Circuit has noted that "[t]he Advisory Committee on Judicial Activities of the Judicial Conference of the United States concluded that a judge should disqualify himself when a controlled subsidiary of a corporation in which he owns stock is a party." (Footnotes omitted) *Weingart v. Allen and O'Hara, Inc.*, 654 F.2d 1096, 1107 (5th Cir. 1981). *See also Catherines v. Copytele, Inc.*, 608 F. Supp. 1031 (E.D.N.Y. 1985) and *Harvard Note*, p. 753.

In this case, substantially all the assets and business of J.P. Morgan are derived from Morgan Guaranty such that a financial interest in J.P. Morgan is indistinguishable from a financial interest in Morgan Guaranty for purposes of 28 U.S.C. § 455. If ownership of stock in a corporate party litigant requires disqualification in order to ensure the appearance of impartiality, it is equally necessary to disqualify a judge for stock ownership in a bank holding company whose subsidiary bank makes up 95% of the holding company's assets — especially one of the stature of J.P. Morgan/Morgan Guaranty.

(c) The Ownership of Stock in the Bank Holding Company of a Major Creditor Establishes a Reasonable Basis for Questioning the Judge's Impartiality.

The Petitioners argue above that disqualification under 28 U.S.C. § 455(b)(4) is merely a specific and more precise instance of disqualification where the judge's "impartiality might reasonably be questioned" as provided in 28 U.S.C. § 455(a). The argument is based upon the history behind the 1974 amendments to § 455. Nevertheless, the Fifth Circuit has drawn a distinction between § 455(b)(4) and § 455(a) by noting that "§ 455(a) does not explicitly require knowledge." *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d at 802. Petitioners argue herein that the knowledge requirement of § 455(b)(4), when applied to a judge's own financial interest, cannot be evaded by subjective factors such as memory or failure to recognize what the objective facts clearly state. This argument comes close to, if it is not identical with, the "constructive knowledge" view of § 455(a) taken in *Health Services*. Petitioners also assert that the bankruptcy judge had sufficient information in hand and a sufficient interest in a party that his impartiality might reasonably be questioned under § 455(a).

In *Health Services*, the court held that the trial judge had constructive knowledge of what he had known but had forgotten and observed that the "judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality." 796 F.2d at 802. So it is here. Judge McGuire was aware of his J.P. Morgan stock ownership and regularly received reports which on their face indicated that J.P. Morgan owns Morgan Guaranty. Morgan Guaranty is the predominant business of J.P. Morgan and the sole business discussed in the *Value Line* reports regularly received by the bankruptcy judge. He had a mandatory duty

to inform himself about his financial interests. These facts alone objectively establish that the bankruptcy judge had an interest in a party and constructively knew that he had an interest in that party. The judge's stated unawareness of the relationship between J.P. Morgan and Morgan Guaranty is "not the sort of objectively ascertainable fact that can avoid the appearance of partiality." *Id.*

2. The Challenged Orders Are Invalid.

(a) Only Vacation of The Judgment and a New Trial Adequately Protect the Public's Expectation of Impartiality.

Conflict exists among the circuits as to the appropriate judicial reaction where challenges are made post-judgment to orders entered by a judge disqualified under 28 U.S.C. § 455. The Fifth Circuit has concluded that a judgment entered by a judge in circumstances where the judge's impartiality might be questioned on an objective basis must be vacated. *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d at 802 and 803. The Seventh Circuit has concluded that disqualification under § 455(a) for mere appearance of partiality operates only prospectively from the time of the motion in the absence of actual bias. *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). The Ninth Circuit has concluded that "if the judge had knowledge within the meaning of... [Section 455(b)(4)] at the time he sat, all his rulings must be vacated." *Davis v. Xerox*, 811 F.2d 1293, 1296 (9th Cir. 1987), *petition for cert. filed* (July 6, 1987).

As the Fifth Circuit has said: "[g]enerally, a judge who learns he has a financial or other interest in a case is only required to recuse himself from future proceedings." *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d at 801. This is,

of course, the way Congress hoped the statute would work. The duty to disqualify is that of the judge. If done optimally, disqualification will happen early and a new judge be assigned. But this cannot happen when a judge overlooks, ignores, or forgets a financial interest in a party.

Respondents below would simply say that it is harmless error if a judge fails in his duty to disqualify where information available to him reveals a disqualifying financial interest unless actual bias is shown. In all cases of judicial amnesia, they would say there is no remedy. But they fail to say how this furthers the congressional interest in encouraging public confidence in judicial impartiality.

Petitioners have argued above that 28 U.S.C. § 455(b) identifies grounds to disqualify a judge because these grounds suggest partiality to the public and not because they always or usually result in biased decisions. Contrary views, not based on a full review of the legislative history, are ennunciated by the Seventh Circuit in, e.g., *United States v. Murphy*, 768 F.2d at 1539-41. If Petitioners are correct, and holding interests as defined in § 455(b)(4) results in disqualification in part because failure to do so undermines public and litigant confidence in the impartiality of the judiciary, then failure to provide a post-judgment remedy inadequately secures the protected interest.

The statute contains no express remedy for this situation. The legislative history reflects opinions running from reversal so long as the matter pends on appeal to collateral attack.[28]

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[28] *Senate Hearings*, p. 22 (testimony of Senator Bayh: indicating that the issue should be resolved within the appeal process based on timely objection); *Senate Hearings*, p. 36 (testimony of John P. Frank: "It is my view that if the judge turns out at the appeal stage to have had any interest, it is reversable error."); *House Hearings*, p. 16-17 (testimony of Judge Traynor: "That is whether

Nowhere does any part of the legislative history suggest that there is no remedy where a judge has overlooked, ignored or forgotten a disqualifying interest and gone ahead and participated in a case.

The judicial function in cases like this must be to formulate and apply a remedy which will effectuate the goals set out in the statute. The principal goal of the 1974 amendments is to

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a judge who sits in violation of these standards, whether the judgment that he enters is then subject to collateral attack [sic]. It would be my judgment that where his disqualification was for financial interest, and he did not keep track of his interests or if he deliberately sat despite the financial interest, thinking that, say, five shares in General Motors was insubstantial, in violation of our more heroic provision that any interest, however small, would raise a serious question as to whether that judgment would be subject to collateral attack. [at 16] . . . I think there is strong support for the proposition that a judge who sits in violation of the financial interest disqualification would subject his judgment to collateral attack. [at 17]"); *House Hearings*, p. 16-17 (testimony of John P. Frank: " . . . should he have a misunderstanding or misinterpretation of the matter, he is subject to review. He is subject to mandamus and he is subject to reversal. [at 16] . . . I would say, if I might supplement, it is subject to direct attack without question. The question of collateral attack, whether it reaches the point that it becomes, as the Judge has said, a denial of due process and is so void or whether it is mere error would require a set of qualifications that is beyond the scope of this bill or our commentary. [at 17]"); and 120 Cong. Rec. 36,269 (1974) (statement of Rep. Kastenmeier: "It may be noted that neither existing nor proposed section 455 contains a sanction to enforce compliance. The section simply requires self-disqualification. The judge may be petitioned to disqualify himself. Failing this, he may be admonished. He may be reviewed, he may be mandamused and he may be reversed. The chief judge of the circuit may remove him from a particular case and, ultimately, a judge could be impeached and removed for failure to maintain 'good behavior'.")

assure the public and losing litigants that judicial decisions will be or have been made on the merits and not affected by taint of the interests of individual judges. This taint need not be the conscious pursuit of interest[29] but will often be an inclination borne of an interest which tips "the scales of justice."[30] To be adequate, the remedy must remove the grounds for public doubt about judicial impartiality. This doubt arises when reasonable people would infer "that a judge has knowledge of facts that would give him an interest in the litigation." *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d at 802.

(b) Entry of Orders by a Judge Holding a Financial Interest in a Party Deprives the Other Parties of Due Process of Law.

"No person shall . . . be deprived of . . . liberty, or property without due process of law." U.S. Const., Amend. V. In *Tumey v. Ohio*, 273 U.S. 510 (1927) the Court held that the petitioner was denied fourteenth amendment due process when he was tried by a judge who received as compensation a small portion of the fine when he convicted persons. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) *reh'g denied*, 393 U.S. 1112 (1969), the Court held that an arbitration award should not be enforced where the impartial arbitrator failed to disclose that he owned an interest in a company that sporadically rendered services for a party to the arbitration which generated about $12,000 in fees to the arbitrator's company over a four to five year period.

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[29] See *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 466 (1952), quoted *supra* pgs. 15-16.

[30] Letter from Prof. David Mellinkoff to Sen. Griffin dated Oct. 20, 1969, as reported in Sen. Exec. Rep. No. 91-12, 91st Cong., 1st Sess. 46 (1969) (individual views of Sen. Griffin).

The court stated "[s]ince in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings . . ." 393 U.S. at 148 (emphasis original). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

The content of due process is derived in part from "those settled usages and modes of proceeding existing in the common and statute law of England . . ." *Tumey*, 273 U.S. at 523. "There was at the common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justices of the peace." *Tumey*, 273 U.S. at 525. Direct pecuniary interest is the oldest common law basis for judicial disqualification. *Frank Disqualification*, p. 609. In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court expanded *Tumey* to invalidate judgments entered by a judicial officer who also had executive responsibilities in a city where the court produced a substantial portion of the city's funds, i.e., any supposed benefit to the judge arose indirectly. As the Court said in *Commonwealth Coatings*:

> Although in *Tumey* it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. Nor should it be at all relevant . . . that "[t]he payments received were a very small part of [the arbitrator's]

> income . . . ." For in *Tumey* the court held that a decision should be set aside where there is "the slighest pecuniary interest" on the part of the judge and specifically rejected the state's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . . ." ". . . in the case of courts this is a constitutional principle . . . ."

393 U.S. at 148.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (1986), the Court vacated a judgment affirmed by the Alabama Supreme Court because one of the participating justices had initiated actions on legal theories similar to that in *Lavoie* during the period of the Alabama court's consideration of that case. This conflict was not discovered until a motion for rehearing was pending in the Alabama Supreme Court. This Court held that the affirmance of such a judgment violated fourteenth amendment due process, not because the judge was influenced by his interest, but because the interest might offer a temptation to the average judge to tip the nice balance of decision-making. *Lavoie*, 106 S.Ct. at 1587. "[T]o perform . . . [justice's] high function in the best way, 'justice must satisfy the appearance of justice.'" *Id*, citing *Murchison*, 349 U.S. at 136.

Like the Senate and House Committees[31] and like Judge Traynor[32] and Professor Thode,[33] Petitioners believe that these cases strongly suggest, if they do not hold, that a judicial decision rendered by a judge owning a financial

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[31] *House Report*, p. 7 and *Senate Report*, p. 6.

[32] *House Hearings*, p. 17.

[33] *Senate Hearings*, p. 95.

interest in a party at the time the decision is rendered denies a litigant of its due process right to an impartial hearing. Such a denial renders the judgments entered *void*.[34]

(c) Disqualification is Jurisdictional.

Numerous state courts have held that statutes and constitutional provisions disqualifying judges because of interests are jurisdictional and orders entered by disqualified judges are void.[35] No federal cases have been found considering the relation between disqualification of judges and jurisdiction.

Petitioners argue that 28 U.S.C. § 455 is jurisdictional. Section 455 is mandatory and establishes standards for disqualification of federal judges. The only constitutional basis for Congress to limit the authority of federal judges is its power to establish such courts, inferior to the Supreme Court, as it deems appropriate and to regulate the appellate jurisdiction of the Supreme Court. U.S. Const., Article III, Sections 1 and 2. Because of these powers, the jurisdictional authority of federal courts under article III of the United States Constitution is not considered self-executing, but may be limited by Congress. *Cary v. Curtis*, 3 How. (44 U.S.) 236 (1845); and *Palmore v. United States*, 411 U.S. 389 (1973).

If the authority to disqualify judges by statute is derived from Congress' authority to regulate the jurisdiction of federal courts, it follows that § 455 is jurisdictional and decisions

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[34] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

[35] *See, e.g., Gaer v. Bank of Baker*, 107 P.2d 877 (Mont. 1940); *Buckholts Indep. School Dist. v. Glaser*, 632 S.W.2d 146 (Tex. 1982); *Casterella v. Casterella*, 409 N.Y.S.2d 548 (N.Y. App. Div. 1978); and, *generally*, Annotation, *Disqualification Of Judge Because Of His Or Another's Holding Or Owning Stock In Corporation Involved In Litigation*, 25 A.L.R.3d 1331 (1969).

made by disqualified judges are void as beyond the court's jurisdiction.[36] No reason is apparent for treating the matter of judicial incompetence to act because of a disqualification differently from that of subject matter jurisdiction. In both cases, the interest of the judiciary and public in the reality and appearance of judges' impartiality transcends the interests of the litigants. Cf. *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437 (5th Cir. 1968), *cert. denied*, 404 U.S. 941 (1971); *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796 (5th Cir. 1986), *cert. granted*, 107 S.Ct. 1368 (1987); and *Commodity Futures Credit Comm'n v. Schor*, __ U.S. ___, 106 S.Ct. 3245 (1986).

Since the jurisdiction of bankruptcy judges is derived from the jurisdiction of the district courts and is created by the discretionary reference of such matters to the bankruptcy judges by the federal district court, 28 U.S.C. §§ 1334 and 157 (1982 and Supp. II 1984), the disqualification of a bankruptcy judge is jurisdictional since his jurisdiction can in no event exceed that of the district court from which the bankruptcy judges' authority has been referred.

(d) The Petitioners Were Not Given a Full Opportunity to Develop Information Relating to the Scope of the Knowledge of the Bankruptcy Judge.

The Petitioners' Motion to Vacate was accompanied by copies of the transcript of the telephone conversation wherein the judge first revealed his stock ownership, the *Value Line* on J.P. Morgan and the judge's Financial Disclosure Reports. App.-18 and 22 for transcript and *Value Line*.

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[36] Decisions by courts without jurisdiction over the subject matter are void and may be collaterally attacked except where the issue of subject matter jurisdiction has been litigated in which case it must be raised by appeal. *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

The ownership of the stock and the relation of J.P. Morgan to Morgan Guaranty were not disputed. The Petitioners contended that this was sufficient to show the judge's disqualification at the times the Bankruptcy Court Orders were entered and that their invalidity legally followed. Alternatively, Petitioners requested the district court to provide them an opportunity to conduct discovery on the judge's interest and his knowledge of that interest.

The bankruptcy judge informed the parties of his interest on March 23, 1987. Petitioners filed their motion on March 31, 1987, and about April 1, 1987, caused notices to be issued to take the bankruptcy judge's deposition. Other efforts to examine the scope of the judge's interest and knowledge were also undertaken. See App.-26 for example of other steps being taken.

The district judge not only relied on the undisputed fact of ownership, but drew numerous factual, exculpatory inferences from the unsworn information and denied any opportunity to conduct discovery, put on evidence, or be heard on the facts.[37] For example, the district court "found" that the judge consulted a "knowledgeable professional" about the connection between J.P. Morgan and Morgan Guaranty and was told there was no connection. App.-13. The unsworn record does not even reflect who this knowledgeable professional is, but it does show that this person does not recall the conversation described. *Id.* Customary inquiry would reveal how a "knowledgeable professional" could not know of the relation between J.P. Morgan and Morgan Guaranty and whether the conversation recalled by the bankruptcy judge was with his broker, someone else, or was only an intended

[37] A status conference was held before the district judge concerning jurisdiction and timing of the decision.

inquiry memory of which later was merged with reality. Deposition testimony would reveal the full scope of information in the judge's possession, e.g., fiduciary and personal tax information on dividends, other reports received, reports from brokers, etc. All of this is pertinent if the admitted ownership of the stock and possession of the *Value Line* information is not legally sufficient to show disqualification under § 455(b)(4) or § 455(a). Petitioners believe that it was, but were willing to develop further information in case, applying an objective standard, the court wanted more information. Nevertheless, the district court entered the Order Quashing Deposition.[38]

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[38] The Petitioners had also noticed the bankruptcy judge's deposition from the clerk's office of the Bankruptcy Court. This notice was subsequently suspended indefinitely by the newly assigned bankruptcy judge. App.-33.

CONCLUSION

For the foregoing reasons, Petitioners believe this case presents serious issues of the administration of the federal bankruptcy courts and the proper procedures required to protect the appearance of impartiality of bankruptcy judges. For this cause, Petitioners urge this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review its decision herein.

Respectfully submitted,

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